THE HONOURABLE SRI JUSTICE P.S.NARAYANA

W.P.No.18339 of 2006

% 04-12-2007

P.Sarabha Reddy
….Petitioner

Vs.

$ The Chairman & Managing Director, The Singareni Collieries Company Limited, Hyderabad & others
…. Respondents

!Counsel for the Petitioner: Sri M.V.Rama Rao

Counsel for the Respondents: Sri Nandigam Krishna Rao

<Gist :

>Head Note:

? Cases referred:
-Nil-

HON'BLE SRI JUSTICE P.S. NARAYANA

Writ Petition No. 18339 of 2006

Date: .12.2007

Between:

P. Sarabha Reddy

… Petitioner

and

The Chairman & Managing Director,
The Singareni Collieries Company Limited,
Hyderabad & others

… Respondents

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O R D E R:

This Court issued rule nisi on 04.09.2006. On 21.09.2006 in W.P.M.P.No. 23049 of 2006, this Court made the following order:

> " The order of the 3rd respondent bearing Ref.No.CRP/CVL/L/700?2402 dated 02.06.2006 is suspended to the extent the petitioner is "debarred" from participating in future tenders of the Singareni Collieries Company Limited, for the reason that this order amounting to blacklisting, has been passed without notice or opportunity to the petitioner."

2. Heard the learned counsel on record and also perused the respective stands taken by the parties in their pleadings.

3. The writ petition is filed for a writ of mandamus declaring the action of the third respondent in forfeiting the EMD amount of Rs.1,03,000/- and debarring the petitioner for one year vide order in Ref.No.CRP/CVL/L/700/2402 dated 02.06.2006 as illegal, arbitrary and violative of Articles 14 and 21 of the Constitution of India and further declare that the petitioner is entitled to refund of the EMD amount with interest at the rate of 12% per annum with effect from 01.05.2006.

4. It is stated that the petitioner is a registered civil contractor and had executed various works to the satisfaction of the respondents, that he participated in the tenders invited by the third respondent for execution of various works and paid an amount of Rs.1,03,000/- towards E.M.D., that in the tender schedule, by inadvertence, he filled the 'minus column' at (-) 18%, that his intention was to submit the tender at (+) 15%. It is further averred that through letter dated 14.04.2006, the third respondent requested the petitioner to attend for discussion with tender committee, that accordingly he attended the discussion on 24.04.2006, wherein he was advised to give consent to carry out the work at (-) 18%, but the petitioner requested for allotment of work at (+) 15%, that subsequently after five weeks, the third respondent issued the order dated 02.06.2006 debarring him from

further participating in tenders of SCCL including works on Unit Rate System for a period of one year with immediate effect. It is further stated that the petitioner had made representation dated 02.08.2006 to the second respondent to release the EMD amount and to revoke the condition of debar, that since there is no reply, he made further representation dated 21.08.2006 to the first respondent, but no action has been taken thereon. In such circumstances, the petitioner approached this Court praying for the relief specified supra.

5. The interim order already made and the order made on the vacate application had already been referred to.

6. In the counter-affidavit filed on behalf of the respondents, it is stated that though the petitioner participated in the tenders called for by the third respondent and paid EMD of Rs.1,03,673/-, the respondent-company has considered the lowest offer quoted by the tenderer in the prescribed tender document and the tender was processed accordingly. It is further stated that since the petitioner has become L1 tenderer, he was called for discussions on 19.04.2006, but he did not attend the same, that on 26.04.2006, he attended for discussions and did not agree for carrying out the work at (-) 18% below the respondents' estimate and thus backed out from his quoted lowest offer. The relevant clauses of the tender had been extracted hereunder:

> " Clause (1) "I/We further agree to sign on an agreement bond within two weeks from the date of acceptance of my/our tender failing which I/we shall be liable for forfeiture of the earnest money deposit by SCCL."
>
> Clause 2) "I/We also agree to start the work within two weeks as may be directed by you from the date of signing the agreement bond and to carry out the work in strict accordance with the specification and conditions of contract failing which, I/we shall be liable for the forfeiture of the earnest money deposit

in full and the contract will be considered as cancelled."

Clause 9) Schedule of specifications attached to the tenderer:

"The tenderer has to keep his tender valid for FOUR MONTHS" from the date of opening tender so as the tender shall valid for acceptance for a period of "FOUR MONTHS" from the date of opening tenders."

It is stated that in view of the above, the petitioner has to keep his offer open for a period of four months from the date of opening of the tender, whereas the petitioner has backed out during the validity period due to which the tenders are being recalled, thus lot of time is wasted and it may also result in extra expenditure and hence the EMD of the petitioner was forfeited and he was debarred for a period of one year. It is further stated that the petitioner is Class-I contractor and is fully aware of the terms and conditions of the contract, that since he has become the lowest tenderer, the petitioner has backed out to carry out the work and, therefore, the tender committee has debarred him. It is further stated that if the petitioner has got any grievance, his remedy lies in Clause 20 of the General Conditions of the Contract, which are as follows:

" 20. Settlement of disputes:

Any dispute or difference of opinion arising between the General Manager (Civil) or his authorized representative and the contractor in respect of the drawings, specifications, measurements, manner of executing or anything connected with the work, not specially provided for herein under the specifications or in respect of the meaning of any clause of these General Conditions shall be adjudicated by the arbitrator nominated by C&MD of SCCL for the disputes costing up to Rs.50,000/- and shall be binding on all parties without any reference or appeal to any other person whatever.

However, the claims above Rs.50,000/- in value shall be decided by Civil Court of competent jurisdiction and not by Arbitration.

> The parties raising the dispute shall request the C&MD of the company to nominate an arbitrator. If C&MD of the company does not nominate an arbitrator within one month of receipt of notice, the arbitration agreement automatically lapses. The parties have to approach "CIVIL COURT" competent jurisdiction for deciding the claims."

It is also stated that the estimated cost of works is Rs.46.00 lakhs, that after considering the tender submitted by the petitioner, the tender committee recommended for forfeiture of EMD and for debarring the petitioner for a period of one year. It is also stated that since the petitioner was well aware of the consequences of backing out from executing the work, there is no necessity of giving any show cause notice to him. Further it is stated that in view of the law laid down by the Hon'ble Supreme Court in **LIC v. Escorts** to the effect that "in any event it is not an employment contract but a commercial contract between two consulting and willing persons natural and jural. Importations of public law principles into such non-statutory contract is not widely established principles", the writ petition is not maintainable. Further specific stand had been taken that it is a settled proposition of law that interpretation and implementation of a clause in a contract cannot be a subject matter of writ petition under Article 226 of the Constitution of India, that whether the contract envisages actual payment or not is a question of construction of contract, that if the term of contract is violated, ordinarily, the remedy is not the writ petition under Article 226 of the Constitution of India.

7. In the light of the controversial issues, it is stated that this is a matter for adjudication by the civil Court or in arbitration, if provided for by the contract and definitely the writ petition is not maintainable.

8. The proceedings dated 02.06.2006, whereunder the writ petitioner was debarred from participating in the tenders of SCCL

including the works on unit rate system for a period of one year with immediate effect reads as under:

"The Singareni Collieries Company Limited
(Regd. Office: Kothagudem – 507 101, A.P)
Bhadrachalam Road Rly. Stn., SC. Rly,
Khammam District (A.P)

(A Govt. Company)

Grams: Manager
Telex: 0423-205 SCCL IN
FAX : 08744-242305
E.Mail: gm_cvl@scclmines.com
Phone: 08744-245724

Ref.No.CRP/CVL/L/700/2402 Date: 02.06.2006

Sri P. Sarabha Reddy,
H.No. 21-6-59,
HanumanNagar,
Fertilizercity,
GODAVARIKHANI – 505 210
Karimnagar Dist.

Dear Sir,

Sub: Providing WBM roads, drains, pavements chain link mesh fencing for parks, grouting of electrical poles, compound wall and other connected works etc. for 210 Nos. miners houses at play ground at Sector III Colony, R.G.II Area – Reg.
Ref: T.E.No. RG2/CVL/T-119/2005-06 dated 30.01.2006.

You had participated in the tender for the subject work and quoted in both "Plus" and "Minus" columns as (+) 15% and below as (-) 18%, in the tender document.

Further during negotiations/discussions you were advised to give your consent to carry out the work at (-) 18% quoted by you, but you have not agreed for the same and on the other hand, you have requested for approval of + 15%. Thus you have backed out to carryout the subject work at your quoted offer of (-) 18% below company's estimate. Hence, it has been

decided to forfeit the EMD submitted by you and to cancel the tenders for the subject work.

In view of the above, please note that you are hereby debarred from further participating intenders of SCCL including works on Unit Rate System for a period of ONE YEAR with immediate effect.

Yours faithfully,

GENERAL MANAGER (CIVIL)"

9. It is not a serious controversy between the parties that before making the impugned order, no show cause notice as such had been issued. No doubt, the forfeiture of EMD submitted by the petitioner also had been referred to in the said order.

10. In the light of the facts and circumstances, as far as forfeiture of the EMD is concerned, the petitioner is permitted to make a representation to the respondents and let the respondents consider the said representation in accordance with law and take appropriate decision in this regard within a period of eight weeks from the date of receipt of a copy of this order. As far as depriving the petitioner from participating in the tenders of SCCL including works on Unit Rate System for a period of one year with immediate effect is concerned, the same was not preceded by any show cause notice whatsoever and in view of the violation of the principles of natural justice, the said order cannot be sustained and accordingly the same is hereby quashed.

11. It is needless to say that the respondents are at liberty to initiate appropriate action, if they choose to do so in accordance with law in this regard.

12. With the above observations, the writ petition is disposed of. No order as to costs.

(P.S. NARAYANA, J)

December , 2007

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